54975-8

54975-8

NO. 54975-8-I

78611-9

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Respondent

v.

CURTIS E. GRAHAM,

Appellant.

BRIEF OF RESPONDENT

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1. Did the trial court properly admit defendant's audiotaped confession where he was properly advised of his constitutional rights, and the requirements of RCW 9.73.090 were strictly complied with?

2. Did the trial court err when, after balancing the probative value against the potential for unfair prejudice, it admitted evidence of some of defendant's prior bad acts that tended to show motive and identity?

3. Where defendant initially told the police that he was not at the crime scene but was with someone else, then confessed, and alibi was not asserted at trial, should the trial court have instructed the jury specifically that defendant had no burden to prove alibi?

4. During sentencing, defendant interrupted the State's recitation of his criminal history and offender score and asked "Your Honor, may I represent myself concerning that paperwork, please?" The court instructed defendant not to interrupt and that he would have his turn to speak. Did the trial court err by not conducting a colloquy to determine if he wanted to proceed with sentencing pro se?

5. Where the jury, by its verdict, found beyond a reasonable doubt that defendant was armed with a firearm during the assault, and defendant admitted to the police that he was armed with a firearm, did the trial court err by adding a firearm enhancement to defendant's standard range sentence?

II. STATEMENT OF THE CASE

On January 14, 2004, Ms. Moore, defendant's former girlfriend, was driven to work by the victim. Defendant arrived, parked near the victim, and called out to Ms. Moore. Ms. Moore ran into her workplace. Defendant fired two shots into the driver's door of the victim's car. One shot hit the victim. CP 108-110.

Defendant was arrested at about 9:30 AM. 7/15 RP 35. At about 11:55 AM, defendant arrived at the Bothell police station for interrogation. 7/15 RP 36. At about 6:20 PM, an officer entered defendant's cell, apparently for a routine check. Defendant asked to use the phone. The officer told defendant that he would be given access to a phone when he got to the jail. 7/15 RP 37-38.

At about 7:30 PM, two detectives entered defendant's cell advised him of his Miranda[1] rights, and asked if defendant was

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

willing to talk to them. Defendant answered that he was willing to talk to the detectives. Finding of Fact 5, CP 83.

The detectives took defendant upstairs to an interview room. In the room was a security camera. 7/15 RP 33. The camera had the capability of recording what happened in the room on video tape. The video tape also recorded sounds. Finding of Fact 8, CP 83. The camera was recording the activities in the interview room before defendant was brought in. 7/15 RP 32. When the detective who put the video tape in the machine was asked if he or some other officer started the video taping, the detective said he didn't have any specific recollection. 7/15 RP 59.

Defendant was asked if the interview could be audio taped. He agreed. The audio tape was started. Defendant was then read his Miranda rights on the tape. Finding of Fact 7, CP 83. The officers informed defendant that this interview was being taped and recorded the start and end times of the interview. Finding of Fact 10, CP 84. At the end of the interview, defendant signed a waiver of rights form. CP 1.

At the beginning of the interview defendant denied that he was anywhere near the shooting. He claimed he was with Ms. Welch. Exhibit 2 15. As the interview went on, the detective told

defendant that Ms. Welch said he was not with her at the time of the shooting. Exhibit 2 64, 66-67. At some point near the end of the interview, defendant told the detectives, "I'm looking at you eyes and I'm saying that's the truth man. . . I got up this morning and I rode up there . . . Vivian was already going to the door of her job . . . [I] shoot him when he drove off." Exhibit 2 139-40.

Twice during the interview, the audio tape was turned off. The first time was when defendant said he needed a lawyer. 7/15 RP 23. The second time was when defendant asked the detective to turn off the tape. 7/15 RP 26. The video camera continued to record both audio and video while the cassette audio recorder was off. 7/15 RP 41, 64.

When defendant asked for an attorney, the detectives immediately stopped asking questions. Defendant was allowed to use the bathroom. When he came out of the bathroom, he started talking to one of the detectives about the victim, and the witness who defendant said would confirm his alibi. It appears that one of the detectives asked defendant if he still wanted to talk. Defendant said he was willing to talk without a lawyer. Exhibit 2 84. After a brief discussion, the audio tape was turned back on. Exhibit 2 86. Defendant was asked again if he was willing to talk without an

attorney. Defendant said "Yeah." He also said he had not been threatened into resuming the conversation. Exhibit 2 87. The "bathroom break" lasted 45 seconds to a minute. 7/15 RP 51. It appears that immediately after defendant left the bathroom, he initiated a conversation with one of the detectives. The detective quickly asked defendant if he was willing to talk without a lawyer, and defendant agreed. Exhibit 2 84.

At one point after the interview resumed, defendant asked that the tape recorder be turned off. He did not ask for an attorney or indicate he wanted to terminate the interview. Exhibit 2 134. Defendant then confessed to shooting at the car driven by the victim. Exhibit 2 139. Defendant then agreed that the tape recorder could be turned back on. He said he still understood his "constitutional rights." Exhibit 2 164. Defendant repeated his confession while he knew the interview was being recorded. Exhibit 2 186-88.

Defendant was charged with first degree assault and unlawful possession of a firearm. CP 59, 66. Before trial, defendant moved to suppress his confession based on a violation

of his right to an attorney under CrR 3.1,[2] improper interrogation tactics, denial of defendant's request for an attorney, that defendant's waiver of his rights was not voluntary, knowing, and intelligent, and violation of the privacy act. 8/10 RP 215-218.

A hearing was held under CrR 3.5.[3] The three officers who participated in defendant's interview testified. Defendant waived his right to testify. CP 82. Their testimony is captured in the above description of the interview.

The trial court made oral findings of fact and conclusions of law. 8/10 RP 209-223. The court concluded that the only ground on which defendant was entitled to relief was the violation of the Privacy Act. The court found there was only one interview. Defendant consented to an audio recording of that interview, but not to a video recording. 8/10 RP 218-19. The court suppressed "all video depictions of the interview." 8/10 RP 220. The court admitted all portions of the audio recording except during the two occasions when defendant withdrew his consent. The court precluded the officers from testifying as to their recollections of what defendant said during these periods of time. 8/10 RP 221.

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[2] A copy of CrR 3.1 is at Appendix A.
[3] A copy of CrR 3.5 is at Appendix B.

Written findings of fact and conclusions of law were entered by the court. CP 82-89. They were consistent with the oral findings and conclusions.

Before trial, defendant moved to prevent testimony about some prior criminal acts he was suspected of having committed. 8/16 RP 14. Defendant argued ER 4.02, ER 4.03, and ER 4.04(b) required suppression. CP 78, 8/16 RP 15. The court suppressed all events before December 26, 2003. The court balanced the probative value of the alleged acts and found it outweighed any prejudice. The court found the evidence relevant to "show the nature of the relationship between [defendant] and Ms. Moore." The court also found the evidence probative on the issues of identity and motive. 8/16 RP 16. Defendant did not request a limiting instruction or argue that there was insufficient evidence that defendant committed the acts.

During the trial, Sharon Martin, the mother of Ms. Moore, testified. Before she took the stand, defendant moved to limit her testimony and not testify about threats he made to her about killing members of her family. The court deferred ruling and directed defendant to "make objections as the evidence comes in[.]" 8/16 RP 99.

When Ms. Martin testified about threats defendant made to her, defendant objected twice. One objection was based on hearsay. It was sustained. 8/16 RP 105. The second objection was based on its prejudicial impact outweighing its probative value. The court overruled the objection saying, "Based on my understanding that this is in the context of sort of one conversation as to these statements, the objection is overruled." 8/16 RP 108.

Detective Hale of the Kent Police Department testified that he had received a report that defendant was stalking Ms. Moore. 8/17 RP 119. The officer did not testify about any specific instances of behavior during direct examination. During cross-examination, defendant elicited that the crimes the officer was investigating included tire slashing and having a brick thrown through her window. 8/17 RP 129.

The victim testified that on New Years Day, Ms. Moore's tires had been slashed. 8/17 RP 147. He testified that on January 14, 2004, drove Ms. Moore to work. As Ms. Moore was getting out of the car, she identified the only other person in the area as defendant. 8/17 RP 156. Ms. Moore ran into the building, and the victim started to drive away. The victim heard gunfire, his window glass "sprayed," and he was shot in the side. 8/17 RP 157-58. The

victim was not able to identify defendant as the person who shot him. 8/17 RP 167-68.

Ms. Moore testified that on a Sunday, she did not know the exact date, defendant called her and asked to "rekindle" their relationship. Ms. Moore rebuffed this attempt. When she left work, she found that three of her tires had been slashed. 8/16 RP 52.

Ms. Moore had her tires repaired, then on New Year's Eve got another call from defendant asking her to get back together with him. Again, Ms. Moore refused, and the next morning found that her tires had been slashed. The only threats Ms. Moore received during this time frame were from defendant. 8/16 RP 53.

Ms. Moore also testified that around the middle of January, she had a rock thrown through her dining room window. She did not say who she thought threw the rock. 8/16 RP 53-54.

Ms. Moore described arriving at her work place on January 14, 2004. As she was walking towards the building where she worked, she saw defendant. Ms. Moore ran into the building. 8/16 RP 61. Inside the building Ms. Moore thought she heard three gunshots. She returned to the parking area and saw the victim pulling his car into a parking stall. He told her, "He shot me." 8/16

RP 62. Ms. Moore was positive that the person she saw in the parking lot was defendant. 8/16 RP 63.

During cross-examination, defendant asked Ms. Moore if she recalled making statements at a pre-trial interview that seemed to conflict with her testimony. Ms. Moore said she didn't recall making those statements. 8/16 RP 80-81. Ms. Moore was also asked if she had reported incidents in a petition for a restraining order that were not true. Ms. Moore said they were true. 8/16 RP 81-83. Ms. Moore again positively identified defendant as the only person in the parking lot, and the one she believed fired the shots, even though she did not see the shooting. 8/16 RP 93-95.

During the testimony of the detective who was the primary officer interviewing defendant, there was mention of the transcript of the recording of the interview. The actual recording was not placed into evidence. 8/18 RP 309.

Defendant called only one witness, the detective that interviewed the victim and participated in defendant's interview. 8/19 440-464. Defendant did not introduce any evidence that impeached the testimony of Ms. Moore.

Defendant asked that the court instruct the jury that defendant had no responsibility to prove that he had an alibi. 8/18

RP 422, 8/19 RP 430-31, CP 140. The court ruled that defendant could argue defendant's lack of burden based on the instructions it planned to give, and that there was no need for a "specific" curative instruction. 8/19 RP 431.

The court instructed the jury included that defendant had "no burden of proving that a reasonable doubt exists." CP 56. The court then instructed the jurors that they must find beyond a reasonable doubt that the assault was committed with a firearm, CP 61, that the term "deadly weapon" includes any firearm, CP 67, that defendant had a firearm in his possession or control. CP 68, and that defendant was armed with a deadly weapon at the time of the assault. CP 73. Defendant did not object to any of these instructions or request further instructions beyond the curative instruction for proving alibi. 8/19 RP 430.

The jury convicted defendant of first degree assault and unlawful possession of a firearm. The jury also found defendant was armed with a deadly weapon at the time of the assault. CP 46, 8/31 RP 3.

Before sentencing, defendant moved for a new trial based on ineffective assistance of counsel. He also asked the court to dismiss his appointed counsel. 8/31 RP 4, 17. The motion was

denied, and his counsel represented him during the sentencing hearing.

When the State offered defendant's criminal history and offender score, defendant said, "may I represent myself concerning that paperwork, please?" The court responded, "Please don't interrupt [the State]. You'll have an opportunity to speak." 8/31 RP 21. After defendant's counsel made her comments, the court invited defendant to make a presentation. 8/31 RP 26. Defendant did not request to represent himself or attack his criminal history. Instead, he apologized to the victim and expressed remorse. 8/31 RP 26-27.

The court imposed a sentence of 161 months for the assault, plus a 60 month enhancement. The court imposed 22 months for the unlawful possession of a firearm. The sentences were to run concurrently. 8/31 RP 30. Defendant did not object to the sentence.

III. ARGUMENT

A. INTRODUCTION.

The issues raised by defendant generally fall into three groups: the CrR 3.5 hearing, the trial, and sentencing. Defendant also raises cumulative error.

At the CrR 3.5 hearing the trial court correctly ruled that defendant's confession was admissible since he had been properly informed of his rights, he expressly waived those rights, and was not coerced into confessing by the police. The trial court also correctly interpreted the Privacy Act, RCW Chapter 9.73, by finding that the police strictly complied with RCW 9.73.090(b).[4] when they recorded the audio portions of the interview, but not when they made a video recording of the interview. The remedy was suppression of the video tape in its entirety and the portions of the audio recorded on the video tape when the audio cassette recorder had been turned off.

During the trial, the court allowed the State to introduce evidence of possibly criminal acts that happened starting about three weeks before the charged crime, but suppressed earlier acts. While there was no specific finding by the court that defendant was the person who committed those acts, it is clear the court reached that conclusion based on its rulings. The State also introduced evidence that defendant initially offered an alibi to the police. When confronted with the disbelief of the officer and evidence that defendant's claimed alibi witness would not support the alibi,

[4] A copy of RCW 9.73.090 is at Appendix B.

defendant confessed. The court then found that the general instruction that defendant had no burden to prove anything was sufficient to permit defendant to argue his theory of the case.

At sentencing, defendant expressed dissatisfaction with his assigned counsel. While the State was making its sentencing presentation, defendant asked the court, "may I represent myself concerning [my criminal history and offender score]." The court told defendant he would have an opportunity to speak after the State's presentation concluded. When defendant did speak, he did not renew his request to represent himself or challenge his history or offender score.

The court imposed a standard range sentence. The jury had been instructed to specifically determine if defendant was armed with a deadly weapon, defined as "a pistol, revolver, or any other firearm." The jury returned a special verdict that defendant was armed with a "deadly weapon." It also found the assault was committed with a firearm. The court added an armed with a firearm enhancement to defendant's sentence.

Defendant failed to show any errors committed by the court. Where there are no errors, it is axiomatic that there can be no cumulative error.

B. THE CrR 3.5 HEARING.

1. The Police Did Not Use Coercive Tactics Or Otherwise Overcome Defendant's Will.

Defendant first claims "coercive law enforcement tactics violated due process[5] and rendered the statements involuntary." Brief of Defendant 13. The tactics cited are the misrepresentations of one of the detectives, denial of access to a phone, and "lengthy detention." Brief of Defendant 15. These tactics did not coerce defendant into making a confession.

A confession is voluntary if "under the totality of the circumstances, the confession is not coerced. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997). The circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police. State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984). Here, defendant was properly informed of his rights under Miranda. Exhibit 1. He was in good condition in that he was not under the influence of intoxicants. Defendant's mental abilities, as demonstrated by his conversation

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[5] Defendant argues that the State constitution is more protective of due process rights than the federal constitution. Brief of Defendant 24-31. The argument has been rejected by the Supreme Court. See State v. Amunrud, 124 Wn. App. 884, 887, 103 P.3d 275 (2004) (the Washington constitution provides equal, but not greater, due process protection).

with the police, were more than adequate to make a rational, informed choice to waive or exercise his rights. The only circumstance that could then have caused the trial court to determine defendant was coerced would have been a finding that the police made misrepresentations to defendant, and that there was a causal relationship between the misrepresentations and the confession. Broadaway, 133 Wn.2d at 132.

Defendant maintains that the police misrepresented to him when he would be able to post bail and use a telephone. Brief of Defendant 16. In fact, defendant was told exactly when he would be able to use a phone – either when he was taken back to the holding cell or when he was booked. After that, the detective offered to make a phone call for defendant. Defendant did not request a phone call be made at that juncture. Exhibit 2 60.[6]

Defendant was also told exactly when bail would be set – at booking. Defendant acknowledged he would be taken to the county jail after his interview. Exhibit 2 58. It was not possible to tell defendant exactly when he would be booked because it was

[6] The trial court admitted the 191 page transcript of defendant's interview with the police as Exhibit 2. 7/15 RP 19. The State has designated Exhibit 2 as part of the record on appeal. Defendant mistakenly refers to the transcript as Exhibit 1.

impossible to determine how long the interview would last and when transport would be available. No misrepresentations were made to defendant.

Even if some of the statements made to defendant were vague or misleading, those statements did not coerce defendant into waiving his Miranda rights. Misrepresentations alone do not make a statement involuntary. The question is whether that misrepresentation caused an involuntary waiver of constitutional rights. See State v. Burkins, 94 Wn. App. 677, 695, 913 P.2d 715 (1999).

When defendant was contacted in his holding cell, the detectives properly advised him of his rights. Finding of Fact 5, CP 83. This finding is not challenged by defendant, so it is a verity on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1984).

At the beginning of the interview, defendant was again advised of his rights and freely waived them. Finding of Fact 7, CP 83. The alleged misrepresentations did not occur until page 58 of 191 in Exhibit 2. Specifically, the detective said, "Because this isn't the jail and we haven't set . . . we don't set bail. . . But probably [you can make a phone call] from downstairs or you go to the Sno County." Exhibit 2 58, 60. Exhibit 2 was the transcript of a four

hour and 15 minute interview. While there is nothing in the record demonstrating exactly how long before the alleged misrepresentation defendant waived his rights, simple math leads to the conclusion that it was over an hour (191/4.25 = 45 pages per hour, on average).

About two hours after the alleged misrepresentations, defendant asked that the tape recorder be turned off. He then confessed to being at the crime scene and shooting his gun. Exhibit 2 141. Defendant then agreed to have the tape recorder turned back on. He was asked on the tape if he "still understand your constitutional rights[.]" Defendant said he understood his rights and that he had not been threatened or coerced. Exhibit 2 164-65. Clearly, any coercive effects the alleged misrepresentations might have had at page 58 were no longer compelling defendant to confess at page 165-65.

Defendant next cites denial of his requests to have access to a phone as a coercive tactic. Defendant points to no authority for his asserted, implied requirement that a detective must allow a defendant to use her department issued cell phone or any other phone just because he asks. Brief of Defendant 10. There is no such requirement. Further, he does not show how that denial

caused him to waive his rights and confess. The officers called defendant's alibi witness at defendant's request. Exhibit 2 66. A detectives offered to call someone for defendant Exhibit 2 60. It is clear that denial of defendant's requests to use a phone did not coerce him into confession.

Defendant then claims his "lengthy detention" was coercive. Brief of Defendant 16. Defendant's detention before his interview was not so long that it could have had a coercive effect.

Defendant entered the holding cell at 11:55 AM. 7/15 RP 36. Defendant's interview started at about 7:33 PM. Exhibit 1. Defendant was in the holding cell at the Bothell Police Department for about seven and one-half hours. A detention of about twice that long is not inherently coercive. State v. Saunders, 120 Wn. App. 800, 810, 86 P.3d 232 (2004) (15 hours of detention not inherently coercive). Defendant has provided no compelling arguments why the length of time he spent in the holding cell was inherently coercive.

None of the circumstances provided by defendant lead to the conclusion that the police overbore his will and coerced either a waiver of his rights or his confession. See Berkemer v. McCarty, 468 U.S. 420, 433, n. 20, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (a

defendant can rarely make a colorable claim that a statement was compelled where the police adhered to the dictates of Miranda).

Defendant cites no authority to support his assertion that his will was overborne by police tactics. He provides no authority holding that misrepresentations that do not cause a waiver of rights violate due process. Likewise, there is no authority that seven and one-half hours in a holding cell is inherently coercive. Miranda held that the inherently coercive impact of custodial interrogation was removed by advisement of the rights set out there. 384 U.S. at 467-68. This Court should reach that conclusion in this case.

2. Defendant Re-initiated His Interview With The Police And Withdrew His Request For Counsel Before There Was An Opportunity To Provide Counsel.

During his interview, defendant said, "I need my lawyer in front of me at this point." Exhibit 2 83. The officers took this as an assertion of defendant's right to counsel and stopped the interview. 7/15 RP 23. Defendant continued talking to one of the detectives. The trial court found defendant reinitiated the interview and voluntarily withdrew his request for counsel. Finding of Fact 18, CP 85.

Defendant quotes Exhibit 2 and challenges this finding. Brief of Defendant 21. A challenged finding of fact is a verity if it is

supported by substantial evidence. Substantial evidence exists where there is "a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Hill, 123 Wn.2d at 644.

Despite defendant's claim, Exhibit 2 and the detective's testimony clearly show that defendant did not want his interview to end. Defendant kept talking and asking questions. The officer told defendant he was not allowed to talk to him further because defendant requested an attorney. 7/15 RP 24. The officer clarified that defendant did not want an attorney and was willing to continue the interview. Exhibit 2 87, 7/15 RP 24, 8/9 RP 141-42. That is substantial evidence making the finding of fact a verity.

Since defendant, after exercising his right to counsel, re-initiated contact with police officers and waived counsel, the statements he made were admissible.

Defendant also claims his right to an attorney under CrR 3.1 were violated. The right to counsel under CrR 3.1 does not attach until a defendant asks for counsel. When counsel is requested, the defendant must be provided a phone "at the earliest opportunity" and "any means necessary to place the person in communication with a lawyer." CrR 3.1(c)(2). A valid waiver may be shown if it

occurs before the earliest opportunity to get the defendant in contact with counsel. State v. Wade, 44 Wn. App. 154, 159, 721 P.2d 977 (1986) (earliest opportunity does not mean immediately).

Given the very short time between defendant's request for counsel and withdrawal of that request, and the uninterrupted nature of defendant's talking to the officers, there was no opportunity to provide counsel to defendant.

3. The Trial Court Correctly Applied The Privacy Act To The Facts Of This Case.

The Privacy Act, RCW Chapter 9.73, requires that in order to tape record a conversation with a person in custody, the police must comply with four requirements:

> (i) The arrested person shall be informed that such a recording is being made and the statement so informing him shall be included in the recording;
>
> (ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;
>
> (iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional right, and such statements informing him shall be included in the recording;
>
> (iv) The recordings shall only be used for valid police or court activities.

RCW 9.73.090(b).

Here, the police strictly complied with those requirements when they made the audio recording. They did not comply with those requirements when they made the video recording and when the audio tape was supposed to be turned off. The court properly concluded that the video tape could not be used. It also properly suppressed the portions of the audio tape between defendant's request for counsel and his waiver of counsel on the tape, and from defendant's request to turn off the tape until his consent to re-start the tape. The court further prohibited the officers from testifying about the content of defendant's statements during the periods of time when the recording was not admissible. These careful rulings afforded defendant all the remedy he was entitled to.

Defendant claims the court erred when it found that defendant's freely given consent to an audio recording of his interview complied with the requirements of RCW 9.73.090. Brief of Defendant 33-34. The bases for this assertion is that defendant was not informed of the video recording and his consent to the audio recording only applied to the cassette recorder on the interview table.

Defendant presents no authority for either basis. Instead, he cites cases that interpreted different sections of RCW 9.73.

Recorded conversations between the police and persons in custody are admissible if the requirements of RCW 9.73.090 are strictly complied with. State v. Cunningham, 93 Wn.2d 823, 829-30, 613 P.2d 1138 (1980); State v. Mazzante, 86 Wn. App. 425, 428-30, 936 P.2d 1206 (1997). There is no reason in law or logic for this Court to find that consent to an audio recording of a statement can only be valid if the defendant agrees to the specific machine to be used. Accordingly, the court's admission of the audio taping of the interview of defendant by the police, with the exception of two brief periods of time, was not error.

To the extent the use of a back-up machine may have been error, it was clearly harmless. At the end of the interview, defendant was being taped with his consent only on the cassette recorder. The video tape had run out. 8/10 RP 241. He specifically confessed to being outside Ms. Moore's building and shooting twice at the victim's car. The video tape that was recorded while defendant believed he was not being recorded did not compel defendant to make that confession. The portions of the interview that were taped over on the cassette were at the beginning of the tape, not when defendant confessed. 7/15 RP 31.

Likewise, the fact that defendant was videotaped without his consent should not affect the freely given consent to being audio taped. RCW 9.73.090 requires that a person in custody "shall be informed that such a recording is being made[.]" There is no provision in RCW 9.73.090 that a violation of the Privacy Act by making a video recording when the subject only consented to an audio recording requires suppression of the audio recording as well.

The court correctly determined that the restrictions imposed on the admission of evidence under RCW 9.73.050[7] do not apply to consent taping under RCW 9.73.090. The court then carefully fashioned a remedy that allowed introduction of statements made on audio tape where it was clear that defendant was consenting to that audio taping. The court prohibited the introduction of any statements made while defendant had withdrawn his consent. This Court should affirm the trial court's thoughtful and thorough resolution of this issue.

Defendant's last argument is that our constitutional right of privacy requires suppression of his statements. Brief of Defendant

39-43. He presents no authority holding that a person has any reasonable expectation of privacy in a conversation with police officers that he knows is being taped. Const. Art. 1 § 7 does not apply where there is no reasonable expectation of privacy. State v. Carter, 151 Wn.2d 118, 126, 85 P.3d 887 (2003) (generally, there is no reasonable expectation of privacy in what is voluntarily exposed to others).

B. THE COURT PROPERLY BALANCED THE PROBATIVE VALUE OF DEFENDANT'S OTHER ACTS OF MISCONDUCT AGAINST THE POTENTIAL FOR UNFAIR PREJUDICE AND ADMITTED THAT EVIDENCE.

Defendant moved to suppress evidence of some eight instances where defendant committed a crime or other act. His only objection was that the instances were more prejudicial than probative. CP 78. He did not assert he did not commit the acts nor request a limiting instruction. 8/16 RP 15-16. On the record, the court determined that the evidence was relevant on issues of motive and identity. The evidence was also relevant to show the relationship between defendant and Ms. Moore. The court then balanced the probative value against the danger of unfair prejudice. The court suppressed some of the incidents as too remote to be

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[7] A copy of RCW 9.73.050 is at Appendix D. That section deals with the admissibility of intercepted communications into

relevant. It admitted the others. A court's determination that evidence is more probative than prejudicial will not be overturned unless there is a manifest abuse of discretion. State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001).

Here, there was no abuse of discretion. The "bad acts" were not admitted to show propensity to commit similar acts. Rather, they were admitted to prove identity and motive. ER 404(b).[8] The State did not improperly argue propensity. The analysis of the court on the record demonstrates the exercise – not the abuse – of discretion.

Defendant argues that the acts should have been suppressed because they were not "proven to be committed by [defendant]." Brief of Defendant 50. Defendant did not make this argument at the trial court, thus he cannot raise it on appeal. RAP 2.5(a). "Evidentiary errors are not of constitutional magnitude[.]" State v. Thach, 126 Wn. App. 297, 311, 106 P.3d 782 (2005). Accordingly, an error in admitting this evidence cannot be a "manifest error affecting a constitutional right."

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evidence, a matter not presented here.

[8] A copy of ER 404 is at Appendix E.

Should this Court determine that defendant's in limine motion to suppress this evidence permits this issue to be raised on appeal, there was no error.

> It is undoubtedly the rule that evidence of quarrels between the victim and the defendant preceding a crime, and evidence of threats by the defendant, are probative upon the question of the defendant's intent[.]

State v. Parr, 93 Wn.2d 95, 102, 606 P.2d 263 (1980) (citations omitted). Here, the court found the evidence of defendant's acts of vandalism against his former girlfriend were probative. The former girlfriend testified and was available for defendant to explore "the perceptions, motives and trustworthiness of the [witness] or the circumstances surrounding the alleged quarrels or threats. Parr, 93 Wn.2d at 102. There was no error

In any event, any error was harmless. The test for nonconstitutional harmless error is whether the trial outcome would have been different had there been no error. Thach, 126 Wn. App. at 311. Here, the defendant's former girlfriend put him at the scene of the shooting. He was the only person besides her and the victim in the area. The victim saw a person who was carrying a gun, pointing it in the victim's direction, and who fired two shots into his car as he was trying to leave. Defendant admitted he was at the

scene and fired two shots into the victim's car. There is no reasonable possibility that suppressing the evidence of slashed tires or rocks thrown through windows would have changed the outcome of the trial.

Defendant also argues that he is entitled to relief because the court did not sua sponte give a limiting instruction after it decided to admit this evidence. The failure to request a limiting instruction waives the error. Sturgeon v. Celotex Corp, 52 Wn. App. 609, 623-24, 762 P.2d 1156 (1988). Should this Court determine that defendant may raise this issue for the first time in this appeal, as discussed above, any error was harmless.

C. THERE WAS NO PROSECUTORIAL MISCONDUCT.

Defendant argues that the prosecutor in this case committed misconduct when he questioned the detective about defendant's initially denying he was at the crime scene. Brief of Defendant 54. Defendant's argument is that the questions were designed to elicit the detective's opinion of defendant's credibility, and that opinion invaded the province of the jury. Brief of Defendant 57.

The State did not ask for the detective's opinion of defendant's credibility.

Evidence that a suspect initially provided the police with an account of what happened, then later abandoned that account is admissible to show consciousness of guilt. Consciousness of guilt may be demonstrated by furtive movements, improbable explanations, or lying to the police. State v. Huff, 64 Wn. App. 641, 647, 826 P.2d 698, review denied, 119 Wn.2d 1007 (1992).

Here, defendant initially lied to the police. He claimed he was with Ms. Welch, and was not involved in the shooting. After further questioning, defendant admitted that he was not with Ms. Welch, but was the shooter. Evidence of defendant's initial lie was admissible to show consciousness of guilt.

Further, the detective only expressed the facts that he observed and the statements defendant made to him. He did not editorialize or comment on those facts and statements. The officer's recitation of defendant's lies was not improper.

Defendant also claims the State suggested he had to present evidence to the police to prove his alibi. The contrary is true. Defendant initially claimed alibi. The police did not suggest defendant should have an alibi, defendant raised it. The police properly asked who he was with to eliminate him as the shooter. Defendant freely elected to continue talking to the police, and

eventually admitted he was at the crime scene and was the shooter.

The court properly instructed the jury that defendant had no burden. CP 56. There was no argument from the state that defendant had any burden. There was no error.

D. DEFENDANT DID NOT MOVE TO REPRESENT HIMSELF AT SENTENCING.

At the beginning of the sentencing hearing on August 31, 2004, defendant moved to dismiss his attorney on grounds that she had provided him with ineffective assistance of counsel throughout the trial. On the same basis, he moved for a new trial. RP 8/31/2004 5. The court denied both motions. RP 8/31/2004 12, 18.

While both the Washington State and Federal constitutions protect the right of a criminal defendant to represent himself, "the right to self-representation is not self-executing." State v. Woods, 143 Wn. 2d 561, 586, 23 P.3d 1046 (2001); State v. DeWeese, 117 Wn. 2d 369, 377, 816 P.2d 1 (1991). To exercise the right, a criminal defendant must request it unequivocally, knowingly, intelligently, and in a timely manner. State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002), review denied, 148 Wn. 2d 1022m 66 P.3d 638 (2003); Woods, 143 Wn. 2d at 586.

Defendant did not unequivocally request to proceed with his sentencing hearing pro se, in the context of the record as a whole. See Woods, 143 Wn. 2d at 586, State v. Luvene, 127 Wn. 2d 690, 698-99, 903 P.2d 960 (1995); DeWeese, 117 Wn. 2d at 376. Defendant made clear that he was dissatisfied with his attorney, making two motions during trial to discharge her and stating at sentencing, "I don't want her representing me in nothing no more." RP 8/31/2004 17. Yet, "a defendant's desire not to be represented by a particular court-appointed counsel does not by itself constitute an unequivocal request by the defendant for self-representation." DeWeese, 117 Wn. 2d at 377. He must unequivocally ask to represent himself.

In his brief, defendant states, "The court...denied the motion. 10RP 10-11. At that point, Graham asked to proceed pro se at sentencing. 10RP 17, 21." Brief of Appellant 58. He later repeats himself, stating, "When the motion [to discharge his counsel] was denied, Graham unequivocally asked to go pro se. 9RP 17 [sic]." Brief of Appellant 60. The record does not support these claims.

Only once, halfway through the sentencing hearing, did defendant express any desire to represent himself. Interrupting the prosecuting attorney while he was explaining defendant's criminal

history, defendant asked the court, "Your Honor, may I represent myself *concerning that paperwork*, please?" RP 8/31/2004 21 (emphasis added). The court requested defendant wait his turn to speak. RP 8/31/2004 21. The inquiry hardly constituted an unequivocal request to represent himself throughout the entire proceeding. Indeed, when defendant was given the opportunity to be heard, he did not mention representing himself again. Instead, he expressed remorse about what he did to the victim. RP 8/31/2004 26.

More likely, his question was an expression of his frustration at the prospect spending 22 years in prison. As defendant said himself, "I – I apologize to the courts if I showed any frustration over fighting for my life." RP 8/31/2004 26. Washington courts have held that a statement regarding self-representation may merely be an expression of frustration and not an unequivocal assertion of a defendant's constitutional right. Luvene, 127 Wn. 2d at 699; see also Woods, 143 Wn. 2d at 587. A defendant's statement that he was prepared to represent himself but recognized doing so was out of his league was evidence that the statement was made out of frustration. Id.

Here, defendant stated, "I'm very – I'm not too smart, too bright, on this law situation, I did note that in this motion here. So it's not completely done the way it should – the way a lawyer would do it, but it's – it's enough on there *just to be able to get the motion started*." RP 8/31/2004 5-6 (emphasis added). And, "I'm not a wizard in the law. I don't know how to fill out that paperwork like an attorney would." RP 8/31/2004 17. Implicit in those statements is defendant's recognition that having an attorney, albeit not *his* attorney of choice, would be important to proceeding with a new trial, as well as his intent to have another attorney represent him.

Defendant argues that the court should have engaged in a colloquy to determining whether he waived his right to counsel knowingly and intelligently. Without an unequivocal request to proceed pro se by defendant, however, the court was not obligated to do so. Woods, 143 Wn. 2d at 588. Defendant gave the court no reason to embark on a colloquy. He requested only that his counsel be dismissed, not that he represent himself.

Finally, it should be noted that there is a presumption against finding a waiver of the right to counsel. State v. Vermillion, 112 Wn. App. at 851. It is within the trial court's discretion to determine whether an indigent defendant's motion to discharge his court-

appointed attorney is meritorious. State v. Deweese, 117 Wn. 2d at 376. Such a denial, as well as a denial of a defendant's request for self-representation is reviewed only for abuse of discretion and will only be overturned if manifestly unreasonable, or based on untenable grounds or for untenable reasons. Vermillion, 112 Wn. App. at 855. The trial court's decision not to allow defendant to pursue sentencing pro se was reasonable, given defendant's failure to unequivocally request self-representation.

E. THE COURT PROPERLY ENHANCED DEFENDANT'S SENTENCE BY FIVE YEARS WHEN THE JURY FOUND BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS ARMED WITH A FIREARM.

The jury was instructed that it had to find beyond a reasonable doubt that "the assault was committed with a firearm[.]" CP 61. The jury also had to find that "the defendant had a firearm in his possession or control[.]" CP 68 When the jury returned guilty verdicts, they necessarily found those facts.

On the special verdict form, the jury had to find "defendant was armed with a deadly weapon at the time of the commission of the assault. A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded." CP 73. The jury also had been instructed that "the term 'deadly weapon' includes any

firearm, whether loaded or not." CP 67. The jury returned a special verdict that defendant was armed with a deadly weapon.

Defendant appears to argue that the words on the special verdict form limit the enhancement. Brief of Defendant 62-64. That is too narrow a reading of the entire verdict.

A fact may be used to enhance a sentence if it has been found by a jury beyond a reasonable doubt, or admitted by the defendant. Blakely v. Washington, 542 U.S. 296, ____, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403(2004). Here, we have both.

Defendant admitted in his confession that he was armed with a firearm at the time of the assault. Exhibit 2 188. The jury found he was in possession or control of a firearm and committed the assault with a firearm. The firearm enhancement was proper.

Defendant relies on State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), to support his position. This reliance is misplaced. Recuenco was convicted of second degree assault while armed with a deadly weapon. 154 Wn.2d at 158. The crime of second degree assault may be accomplished if committed by any deadly weapon. RCW 9A.36.021 (1)(c). Thus the jury in Recuenco did not had to find defendant used a firearm or was in possession of a firearm. The crimes pled and proved beyond a

reasonable doubt here required the jury to find defendant was armed with a firearm. Recuenco does not control resolution of this issue.

F. NONE OF THE ERRORS IDENTIFIED BY DEFENDANT, INDIVIDUALLY OR TOGETHER, AFFECTED THE OUTCOME OF THE TRIAL.

Defendant argues that even if none of the errors he assigns above warrant reversal, the cumulative error doctrine deprived him of a fair trial. Since defendant has not identified legal errors that could have a cumulative impact on the jury or the trial, the cumulative error doctrine is inapplicable.

The cumulative error doctrine permits an appellate Court that finds several trial errors, none of which alone justifies reversal, to reverse when it finds that the combination of errors may have denied the defendant a fair trial. If the Court finds defendant has failed to carry his burden and demonstrate actual errors, there can be no cumulative error. State v. Clark, 143 Wn.2d 731, 771-72, 24 P.3d 1006 (2001) (where defendant fails to demonstrate errors, no cumulative error). The State submits defendant has failed to demonstrate any errors that alone, or in combination, deprived him of a fair trial. Applying the cumulative error doctrine would be inappropriate in this case.

Defendant argues that the prior bad acts evidence, coupled with the "comments suggesting" one of the officers did not believe defendant and defendant had to prove his alibi, deprived him of a fair trial.

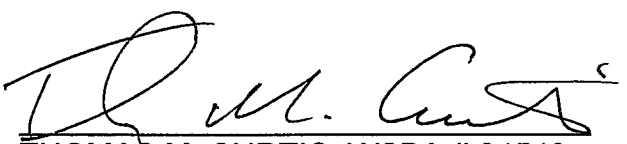
Given the uncontroverted evidence before the jury, including defendant's confession, his identification, the testimony of the victim, and the other evidence, excluding any prior bad acts, any mention of alibi, or any suggestion that the detective did not believe defendant's initial story, there is no reasonable likelihood that the trial would have had a different outcome.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on November 1, 2005.

JANICE E. ELLIS
Snohomish County Prosecuting Attorney

By: 

THOMAS M. CURTIS, WSBA # 24549
Deputy Prosecuting Attorney
Attorney for Respondent

Superior Court Criminal Rules, CrR 3.1

West's Revised Code of Washington Annotated Currentness
Title 10. Criminal Procedure Appendix of Rules
Superior Court Criminal Rules (Crr) (Refs & Annos)
3. Rights of Defendants
RULE 3.1 RIGHT TO AND ASSIGNMENT OF LAWYER

(a) Types of Proceedings. The right to a lawyer shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise.

(b) Stage of Proceedings.

(1) The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest.

(2) A lawyer shall be provided at every stage of the proceedings, including sentencing, appeal, and post-conviction review. A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer pursuant to section (e) because geographical considerations or other factors make it necessary.

(c) Explaining the Availability of a Lawyer.

(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge.

(2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

(d) Assignment of Lawyer.

(1) Unless waived, a lawyer shall be provided to any person who is financially unable to obtain one without causing substantial hardship to the person or to the person's family. A lawyer shall not be denied to any person merely because the person's friends or relatives have resources adequate to retain a lawyer or because the person has posted or is capable of posting bond.

(2) The ability to pay part of the cost of a lawyer shall not preclude assignment. The assignment of a lawyer may be conditioned upon part payment pursuant to an established method of collection.

(3) Information given by a person to assist in the determination of whether the person is financially able to obtain a lawyer shall be under oath and shall not be available for use by the prosecution in the pending case in chief.

APPENDIX A

(e) Withdrawal of Lawyer. Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.

(f) Services Other Than a Lawyer.

(1) A lawyer for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in the case may request them by a motion to the court.

(2) Upon finding the services are necessary and that the defendant is financially unable to obtain them, the court, or a person or agency to whom the administration of the program may have been delegated by local court rule, shall authorize the services. The motion may be made ex parte, and, upon a showing of good cause, the moving papers may be ordered sealed by the court, and shall remain sealed until further order of the court. The court, in the interest of justice and on a finding that timely procurement of necessary services could not await prior authorization, shall ratify such services after they have been obtained.

(3) Reasonable compensation for the services shall be determined and payment directed to the organization or person who rendered them upon the filing of a claim for compensation supported by affidavit specifying the time expended and the services and expenses incurred on behalf of the defendant, and the compensation received in the same case or for the same services from any other source.

CREDIT(S)

[Amended effective September 1, 1986; September 1, 1995.]

COMMENT--1973

2002 Main Volume

Supersedes RCW 10.01.110; RCW 10.40.030; RCW 10.46.050.

COMMENT--1986

Superior Court Criminal Rules, CrR 3.5

West's Revised Code of Washington Annotated Currentness
Title 10. Criminal Procedure Appendix of Rules
Superior Court Criminal Rules (Crr) (Refs & Annos)
3. Rights of Defendants

RULE 3.5 CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

West's RCWA 9.73.090

C
West's Revised Code of Washington Annotated Currentness
Title 9. Crimes and Punishments (Refs & Annos)
Chapter 9.73. Privacy, Violating Right of (Refs & Annos)

➞9.73.090. Certain emergency response personnel exempted from RCW 9.73.030 through 9.73.080--Standards--Court authorizations--Admissibility

(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police, fire, emergency medical service, emergency communication center, and poison center personnel in the following instances:

(a) Recording incoming telephone calls to police and fire stations, licensed emergency medical service providers, emergency communication centers, and poison centers;

(b) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court. Such video and/or sound recordings shall conform strictly to the following:

(i) The arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording;

(ii) The recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof;

(iii) At the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording;

(iv) The recordings shall only be used for valid police or court activities;

(c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles. All law enforcement officers wearing a sound recording device that makes recordings corresponding to videos recorded by video cameras mounted in law enforcement vehicles must be in uniform. A sound recording device which makes a recording pursuant to this subsection (1)(c) may only be operated simultaneously with the video camera. No sound recording device may be intentionally turned off by the law enforcement officer during the operation of the video camera.

No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the incident or incidents which were recorded. Such sound recordings shall not be divulged or used by any law enforcement agency

APPENDIX C

for any commercial purpose.

A law enforcement officer shall inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made and the statement so informing the person shall be included in the sound recording, except that the law enforcement officer is not required to inform the person being recorded if the person is being recorded under exigent circumstances. A law enforcement officer is not required to inform a person being recorded by video under this subsection (1)(c) that the person is being recorded by video.

(2) It shall not be unlawful for a law enforcement officer acting in the performance of the officer's official duties to intercept, record, or disclose an oral communication or conversation where the officer is a party to the communication or conversation or one of the parties to the communication or conversation has given prior consent to the interception, recording, or disclosure: PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony: PROVIDED HOWEVER, That if such authorization is given by telephone the authorization and officer's statement justifying such authorization must be electronically recorded by the judge or magistrate on a recording device in the custody of the judge or magistrate at the time transmitted and the recording shall be retained in the court records and reduced to writing as soon as possible thereafter.

Any recording or interception of a communication or conversation incident to a lawfully recorded or intercepted communication or conversation pursuant to this subsection shall be lawful and may be divulged.

All recordings of communications or conversations made pursuant to this subsection shall be retained for as long as any crime may be charged based on the events or communications or conversations recorded.

(3) Communications or conversations authorized to be intercepted, recorded, or disclosed by this section shall not be inadmissible under RCW 9.73.050.

(4) Authorizations issued under subsection (2) of this section shall be effective for not more than seven days, after which period the issuing authority may renew or continue the authorization for additional periods not to exceed seven days.

(5) If the judge or magistrate determines that there is probable cause to believe that the communication or conversation concerns the unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as

defined in chapter 69.52 RCW, the judge or magistrate may authorize the interception, transmission, recording, or disclosure of communications or conversations under subsection (2) of this section even though the true name of the nonconsenting party, or the particular time and place for the interception, transmission, recording, or disclosure, is not known at the time of the request, if the authorization describes the nonconsenting party and subject matter of the communication or conversation with reasonable certainty under the circumstances. Any such communication or conversation may be intercepted, transmitted, recorded, or disclosed as authorized notwithstanding a change in the time or location of the communication or conversation after the authorization has been obtained or the presence of or participation in the communication or conversation by any additional party not named in the authorization.

Authorizations issued under this subsection shall be effective for not more than fourteen days, after which period the issuing authority may renew or continue the authorization for an additional period not to exceed fourteen days.

CREDIT(S)

[2000 c 195 § 2; 1989 c 271 § 205; 1986 c 38 § 2; 1977 ex.s. c 363 § 3; 1970 ex.s. c 48 § 1.]

HISTORICAL AND STATUTORY NOTES

Intent--2000 c 195: "The legislature intends, by the enactment of this act, to provide a very limited exception to the restrictions on disclosure of intercepted communications." [2000 c 195 § 1.]

Severability--1989 c 271: See note following RCW 9.94A.510.

Severability--1970 ex.s. c 48: "If a court of competent jurisdiction shall adjudge to be invalid or unconstitutional any clause, sentence, paragraph, section or part of this act, such judgment or decree shall not affect, impair, invalidate or nullify the remainder of this act, but the effect thereof shall be confined to the clause, sentence, paragraph, section or part of this chapter so adjudged to be invalid or unconstitutional." [1970 ex.s. c 48 § 3.]

Laws 1977, Ex.Sess., ch. 363, § 3, rewrote the section which previously read:

"The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police and fire personnel in the following instances:

"(1) Recording incoming telephone calls to police and fire stations for the purpose and only for the purpose of verifying the accuracy of reception of emergency calls.

"(2) Video and/or sound recordings may be made of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in

court. Such video and/or sound recordings shall conform strictly to the following:

"(a) the arrested person shall be informed that such recording is being made and the statement so informing him shall be included in the recording,

"(b) the recording shall commence with an indication of the time of the beginning thereof and terminate with an indication of the time thereof,

"(c) at the commencement of the recording the arrested person shall be fully informed of his constitutional rights, and such statements informing him shall be included in the recording.

"(d) the recordings shall only be used for valid police or court activities."

Laws 1986, ch. 38, § 2, rewrote the introductory paragraph of subsec. (1) and rewrote subsec. (1)(a), which previously read:

"(1) The provisions of RCW 9.73.030 through 9.73.080 shall not apply to police and fire personnel in the following instances:

"(a) Recording incoming telephone calls to police and fire stations;".

Laws 1989, ch. 271, § 205, in subsec. (4), following "the issuing authority may" deleted "upon application of the officer who secured the original authorization"; and, near the end, substituted "additional periods" for "an additional period"; added subsec. (5); and added the last paragraph.

Laws 2000, ch. 195, § 2, inserted subsec. (1)(c).

West's RCWA 9.73.050

C
West's Revised Code of Washington Annotated Currentness
Title 9. Crimes and Punishments (Refs & Annos)
Chapter 9.73. Privacy, Violating Right of (Refs & Annos)

→9.73.050. Admissibility of intercepted communication in evidence

Any information obtained in violation of RCW 9.73.030 or pursuant to any order issued under the provisions of RCW 9.73.040 shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security.

CREDIT(S)

[1967 ex.s. c 93 § 3.]

HISTORICAL AND STATUTORY NOTES

Severability--1967 ex.s. c 93: See note following RCW 9.73.030.

APPENDIX D

C
West's Washington Court Rules Currentness
Part I. Rules of General Application
Washington Rules of Evidence (Er)
Title IV. Relevancy and Its Limits

➡RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

CREDIT(S)

[Amended effective September 1, 1992.]

APPENDIX E

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

Respondent,

v.

CURTIS E. GRAHAM,

Appellant.

No. 54975-8-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:
The undersigned certifies that on the 1 day of November, 2005, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 1 day of November, 2005.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit